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**Intellectual Property Causes**  
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**Reston, VA 20191**  
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**Mail Stop Petitions**  
**Confirmation No. 5165**

In re application of : Peter HIMMELSBACH et al.

Attorney Docket No. P29693

Serial No. : 09/601,029

Group Art Unit : 1771

Filed : July 26, 2000

Examiner : Andrew T. Piziali

For : SUPPORTING MATERIAL FOR MEDICINAL PURPOSE

**Mail Stop Appeal Brief-Patents**

Commissioner for Patents

U.S. Patent and Trademark Office

Customer Service Window, Mail Stop Appeal Brief-Patents

Randolph Building

401 Dulany Street

Alexandria, VA 22314

Sir:

Transmitted herewith is a **Third Supplemental Appeal Brief under 37 CFR 41.37** in the above-captioned application.

☐ Small Entity Status of this application under 37 C.F.R. 1.9 and 1.27 has been established by a previously filed statement.

☒ A Petition under 37 CFR 1.181 or 37 CFR 1.137(b).

☐ An Information Disclosure Statement, PTO Form 1449, and references cited.

☐ A Request for Extension of Time.

☒ No additional fee is required.

The fee has been calculated as shown below:

Claims After Amendment	No. Claims Previously Paid For	Present Extra	Small Entity		Other Than A Small Entity	
			Rate	Fee	Rate	Fee
Total Claims: 61	*61	0	X25=	\$	x 50=	\$ 0.00
Indep. Claims: 2	**3	0	X105=	\$	X210=	\$ 0.00
Multiple Dependent Claims Presented			+185=	\$	+370=	\$ 0.00
Extension Fees for ____ Month(s)				\$		\$ 0.00
Total:				\$	Total:	\$ 0.00

\* If less than 20, write 20

\*\* If less than 3, write 3

☐ Please charge my Deposit Account No. 19-0089 in the amount of \$ \_\_\_\_.

☐ A Check in the amount of \$ \_\_\_\_ to cover the filing/extension fee is included.

☒ The U.S. Patent and Trademark Office is hereby authorized to charge payment of the following fees associated with this communication or credit any overpayment to Deposit Account No. 19-0089.

☒ Any additional filing fees required under 37 C.F.R. 1.16.

☒ Any patent application processing fees under 37 C.F.R. 1.17, including any required extension of time fees in any concurrent or future reply requiring a petition for extension of time for its timely submission (37 CFR 1.136)(a)(3).

Heribert F. Muensterer  
 Reg. No. 50,417

Neil F. Greenblum  
 Reg. No. 28,394

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Peter HIMMELSBACH et al.

**Confirmation No. 5165**

Group Art Unit: 1771

Serial No. : 09/601,029

Examiner: Piziali, Andrew T

Filed : July 26, 2000

For : SUPPORTING MATERIAL FOR MEDICINAL PURPOSES

**PETITION UNDER 37 CFR 1.181 OR 37 CFR 1.137(b)**

**Attention: Office of Petitions**

Commissioner for Patents  
U.S. Patent and Trademark Office  
Customer Service Window, Mail Stop Petitions  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Sir:

**I. PETITION UNDER 37 CFR 1.181**

**A. Statement of the Facts Involved:**

The relevant events in this case occurred as follows:

1. On August 2, 2006 an Office Action finally rejecting all claims under consideration in the above-referenced application was mailed by the Patent and Trademark Office.
2. On October 25, 2006 Petitioners filed a Notice of Appeal and a Pre-Appeal Brief Request for Review.
3. On December 26, 2006 Petitioners submitted an Appeal Brief.
4. On February 21, 2007 the Patent and Trademark Office mailed a first Notice of Non-Compliant Appeal Brief stating that the Appeal Brief failed to mention in the Status of Claims section the status of (canceled) claims 1-36.

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5. On March 2, 2007 Petitioners filed a Supplemented Appeal Brief in which the status of claims 1-36 was indicated.

6. On June 25, 2007 the Patent and Trademark Office mailed a second Notice of Non-Compliant Appeal Brief, with the Notice stating for the first time a different ground for non-compliance, i.e., that the Supplemented Appeal Brief did not present an argument under a separate heading for each of the nineteen grounds of rejection on appeal.

7. On July 3, 2007 Petitioners filed a Second Supplemented Appeal Brief which contained arguments pertaining to each of eighteen of the nineteen grounds of rejection on appeal under separate headings. The arguments pertaining to one of the grounds of rejection on appeal, i.e., ground # 17, were inadvertently omitted in the process of rewriting the Appeal Brief.

8. On October 1, 2007 the Patent and Trademark Office mailed a Notice of Abandonment. The Notice of Abandonment states, *inter alia*:

3. The third brief [Second Supplemented Appeal Brief] failed to overcome all the reasons for non-compliance stated in the notification mailed on 6/25/2007. Specifically, the appellant was instructed to present an argument under a separate heading for each ground of rejection, but the appeal brief filed on 7/3/2007 failed to present a separate heading for ground of rejection # 17 (Whether claims 66 and 96 are properly rejected under obviousness-type double patenting as being unpatentable over claims 1-27 of ALBROD in view of MERKLE and further in view of KANTER).

4. As such, 37 CFR 41.37(d) is invoked and the Appeal is Dismissed.

5. Since no claims stand allowed, the application is considered to be abandoned as of the date the reply to the notice of appeal was due (MPEP 1215.04).

## **B. Point or Points to be Reviewed**

Petitioners respectfully submit that that there is no basis for invoking 37 CFR 41.37(d) and dismissing the appeal in the present case. Specifically, 37 CFR 41.37(d) provides (emphasis added):

If a brief is filed which does not comply with all the requirements of paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and given a time period within which to file an amended brief. If appellant does not file an amended brief within the set time period, or files an amended brief which does not overcome all the reasons for non-compliance stated in the notification, the appeal will stand dismissed.

Petitioners point out that in the Second Supplemented Appeal Brief filed July 3, 2007 each argument pertaining to a separate ground of rejection contained therein is presented under a separate heading. Accordingly, the Second Supplemented Appeal Brief filed July 3, 2007 does overcome all the reasons for non-compliance stated in the notification (the second Notice of Non-Compliant Appeal Brief mailed June 25, 2007) but is deficient for a reason which is different from the reason for non-compliance stated in the second notification. Specifically, in the Second Supplemented Appeal Brief the entire section with the argument pertaining to ground of rejection # 17 (presented in the previous appeal briefs) is omitted.

In view of the foregoing facts, there is no basis for dismissing the appeal under 37 CFR 41.37(d) for not overcoming all the reasons for non-compliance stated in the notification.

### **C. Action Requested**

Petitioners petition for withdrawal of the Notice of Abandonment mailed October 1, 2007 pursuant to 37 CFR 1.181. Petitioners further petition for the examination of the present appeal to be resumed on the basis of the THIRD SUPPLEMENTED APPEAL BRIEF UNDER 37 C.F.R. § 41.37 enclosed herewith.

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**II. PETITION UNDER 37 CFR 1.137 (b)**

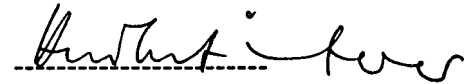
Should the Director determine that the above Petition Under 37 CFR 1.181 is not grantable, Petitioners respectfully petition for revival of the above-referenced application under 37 CFR 1.137(b).

A proper reply to the Notice of Non-Compliant Appeal Brief mailed June 25, 2007 is enclosed herewith in the form of a **THIRD SUPPLEMENTED APPEAL BRIEF UNDER 37 C.F.R. § 41.37**.

The entire delay in filing the required reply from the due date of the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional.

The Patent and Trademark Office is hereby authorized to charge any fees which may be required to restore and preserve the pendency of the present application, including any fees which may be required under 37 CFR 1.17(m), to Deposit Account No. 19-0089.

Respectfully submitted,  
Peter HIMMELSBACH et al.



Neil F. Greenblum  
Reg. No. 28,394

October 15, 2007  
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